81-2042

Office - Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1981
No.

STATE OF MICHIGAN,
Petitioner,
v.
MID-LOUISIANA GAS COMPANY, et. al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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April 30, 1982

PRINTED BY SPEAKER-HINES AND THOMAS, INC., LANSING, MICHIGAN—1982

QUESTION PRESENTED FOR REVIEW

Does the simple act of commingling natural gas produced by a pipeline company with natural gas purchased from others for resale, constitute a "first sale" under the Natural Gas Policy Act of 1978, when such commingling is not accompanied with any of the indicia normally associated with a "sale"?

PARTIES BELOW

The following is a list of all parties to the case below:

American Gas Association
Arizona Electric Power Cooperative and City of Wilcox
Colorado Interstate Gas Company
Columbia Gas Transmission Corporation
Consolidated Gas Supply Corporation
Kansas-Nebraska Natural Gas Company
Mid-Louisiana Gas Company
Natural Gas Pipeline Company of America
Northwest Pipeline Corporation
Southern Natural Gas Company
Kentucky-West Virginia Natural Gas Company
Northern Natural Gas Company
The Public Service Commission of Wisconsin
The State of Michigan and the Michigan Public Service Commission
The Public Service Commission of the State of New York
United Gas Pipeline Gas Company
El Paso Natural Gas Company
Michigan Wisconsin Pipe Line Company
Kansas State Corporation Commission

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The State of Michigan (Michigan) petitions for a Writ of Certiorari to review the December 23, 1981 decision of the United States Court of Appeals for the Fifth Circuit in *Mid-Louisiana Gas Company, et. al.* v. *Federal Energy Regulatory Commission*, Case No. 80-3804. The decision vacated Orders Nos. 58, 98 and 102 issued by the Federal Energy Regulatory Commission (FERC) on November 14, 1979, August 4, 1980 and October 3, 1980, respectively, because of the court's interpretation of Section 2(21) of the Natural Gas Policy Act of 1978, 15 U.S.C. §3301(21).

OPINIONS AND ORDERS BELOW

The Opinion of the United States Court of Appeals for the Fifth Circuit is reported at 664 F.2d 530. The FERC orders are unreported, but are contained in the Joint Appendix shared by Michigan, the Public Service Commission of the State of New York (NYPSC) and Arizona Electric Power Cooperative (AEPCO), and filed with the NYPSC's petition to this court on April 12, 1982 in Docket No. 81-1889.

JURISDICTION

The United States Court of Appeals for the Fifth Circuit entered judgment in this matter on December 23, 1981. In an order dated January 11, 1982, the court extended the time for rehearing until January 20, 1982. Petitions for rehearing filed by Michigan, the NYPSC and AEPCO were denied February 5, 1982. This court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES INVOLVED

Consideration of the decision of the United States Court of Appeals for the Fifth Circuit involves Sections 2(20) and 2(21) of the Natural Gas Policy Act of 1978 (NGPA), 15 U.S.C. §§3301(20) and (21). Those sections read as follows:

> "(20) Sale.—the term 'sale' means any sale, exchange, or other transfer for value." 15 U.S.C. §3301(20).
>
> "(21) First Sale.—
>
> (A) General rule.—The term 'first sale' means any sale of any volume of natural gas—
>
> (i) to any interstate pipeline or any intrastate pipeline;
>
> (ii) to any local distribution company;
>
> (iii) to any person for use by such person;
>
> (iv) which precedes any sale described in (i), (ii), (iii);

(v) which precedes or follows any sale described in clauses (i), (ii), (iii), or (iv) as is defined by the Commission as a first sale in order to prevent circumvention of any maximum lawful price established under this chapter.

(B) Certain sales not included.—Clauses (i), (ii), (iii), or (iv) of subparagraph (A) shall not include the sale of any volume of natural gas by any interstate pipeline, intrastate pipeline, or local gas distribution company, or any affiliate thereof, unless such sale is attributable to volumes of natural gas produced by such interstate pipeline, intrastate pipeline, or local distribution company, or any affiliate thereof." 15 U.S.C. §3301(21).

STATEMENT OF THE CASE

I.

Introduction

Michigan seeks review of a decision of the United States Court of Appeals for the Fifth Circuit, which brought more than 40 years of pipeline regulation to an abrupt halt without explicit statutory authority. In doing so the court judicially created a fictional transaction directly contradictory to an express statutory provision. The decision makes a fictional intracorporate transfer from the act of commingling two sources of natural gas. The lower court said such a transfer occurs between a fictional production division of an interstate pipeline and a fictional transportation division. This transfer was accorded "first sale" status by the court without being a "transfer for value" as required by the definition of "sale" in NGPA, §2(20), 15 U.S.C. §3301(20).

II.

Regulatory Background

Since the inception of regulation in 1938 under the Natural Gas Act (NGA), 15 U.S.C. §717 et. seq., the Federal Power Commission and its successor the FERC have regulated the cost of pipeline natural gas production included in the pipeline customers' rates. This was done on a cost-of-service basis by either capitalizing or expensing production costs, regardless of the success or failure of the production efforts. Therefore, most of the risk of failure was eliminated from pipeline production operations, since the pipeline earned a fair return on all prudent production investment.

In 1969 the commission concluded, after years of hearings in pipeline production area rate proceedings, that pipeline production from leases acquired after October 9, 1969, would be priced at the appropriate "area" rate applicable to sales of gas by independent producers, and it also applied the area rate to pipeline production sold "off system" at the wellhead to other pipelines.[1] The area rate was not applicable to pre-October 9, 1969 production, and certain pipelines were allowed, at their request, to price production from newer leases on a cost-of-service basis, because it resulted in the most financially advantageous rates for the pipeline. However, cost-of-service pricing of these leases became unfavorable with passage of the NGPA, resulting in this litigation.

Quite different, however, is the history of regulating independent natural gas producers. Prior to this Court's decision in *Phillips Petroleum* v. *Wisconsin*, 347 U.S. 672 (1954),

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[1] See, *Pipeline Production Area Rate Proceeding (Phase I)*, 42 F.P.C. 738, 1089 (1969), *affirmed, City of Chicago* v. *FPC*, 458 F.2d 731 (D.C. Cir., 1971), *cert. denied*, 405 U.S. 1074 (1972).

the commission exercised no jurisdiction over sales of natural gas to pipelines by independent producers. After the *Phillips* decision, regulation of independent producer prices resulted in "area" rates, followed by "nationwide" rates.[2] These rates were based primarily on average industry historical costs for flowing gas, and unit rates were applied to each Mcf of gas sold. The risk of failure in production efforts was placed upon independent producers; opposite of the situation then existing with pipeline production.

Federal regulation over independent natural gas producers has been in controversy ever since the *Phillips* case. Twice during the 1950's Congress enacted legislation limiting such regulation, but both bills were vetoed. Each bill expressly addressed pipeline production as well; the first bill excluded pipeline production from deregulation and the second bill specified that pipelines would be allowed the reasonable market price as a part of their cost-of-service for any gas produced.[3]

Producer regulation became an active issue again in the 1970's when curtailment of pipeline service occurred, stemming from inadequate supplies in the interstate market. Many conflicting proposals were considered, from complete deregulation to federal control of all sales in the intrastate market. The compromise legislation which became the NGPA was before Congress for more than two years, but during that time no sponsor of the legislation expressed any dissatisfaction with existing regulation of pipeline production, as contrasted with regulation of producer production.

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[2]

See, *Permian Basin Area Rate Cases*, 390 U.S. 747 (1968).

[3]

See, H.R. 1758, 81st Cong., 2nd Sess., vetoed April 15, 1980, House Doc. No. 555, 81st Cong., 2nd Sess. and H.R. 6645, 84th Cong., 2nd Sess., vetoed February 17, 1956, House Doc. No. 342, 84th Cong., 2nd Sess.

III.

The NGPA and the Concept of "First Sale"

The NGPA does not expressly exempt pipeline production from regulation. Rather it provides eight major categories of "maximum lawful" ceiling prices applicable to "first sales" of natural gas. A "first sale" is the "*sale*" of any volume of gas *to* an interstate or intrastate pipeline, local distribution company or end user, expressly excluding any sale *by* an interstate or intrastate pipeline, local distribution company or affiliate thereof "unless such sale is attributable to volumes of natural gas produced by [it] . . . ." 15 U.S.C. §3301(21)(B). Nothing in the legislative history provides any further elucidation of this language. However, the FERC is delegated authority in Section 501, 15 U.S.C. §3411, to issue rules and to further define the terms used in the act.

In Order No. 58 the FERC adopted a rule which concluded that the only sales "attributable" to pipeline production were those contracted for at the wellhead, rather than the larger share of pipeline production which is commingled with gas purchased by the pipeline for resale to distribution companies or direct sales customers. Effectively then, Order No. 58 meant all production commingled with purchases would remain subject to the commission's pricing jurisdiction under the NGA.

Order No. 58 was followed 9 months later by Order No. 98, amending the commission's regulations under the NGA, as an exercise of discretion, to price all pipeline production that did not already qualify the NGPA prices under Order No. 58, at the applicable NGPA ceiling rates for independent producer sales, unless that gas was currently being priced on a cost-of-service basis due to the pipeline's earlier election. Order No. 102, issued 2 months after Order No. 98, denied petitions for rehearing filed by a number of parties.

Several pipelines then took separate appeals of both FERC orders to the United States Court of Appeals for the Fifth Circuit, based on Section 506(b) of the NGPA, 15 U.S.C. §3416(b). Those appeals of Order No. 58, as affirmed by Order No. 102, were styled *Mid-Louisiana* v. *FERC*, No. 80-3804. Michigan intervened in No. 80-3804 supporting the FERC. The Fifth Circuit's decision and petitions for rehearing followed, as discussed above. Thereafter, this petition for a writ of certiorari was timely filed.[4]

REASONS FOR GRANTING THE WRIT

This case presents considerations of first impression important to the nation's energy policy, i.e., whether 40 years of federal regulation of interstate pipeline production and even more years of state regulation of production by intrastate pipelines and local distribution companies should be ignored in favor of a judicially created fictional transaction. The United States Court of Appeals for the Fifth Circuit concluded that gas produced by a pipeline company is transferred from the production division to the transportation division of the pipeline. This so-called transfer is actually only a commingling of pipeline produced gas with pipeline purchased gas. Moreover, the court held that such a fictional transfer was a "first sale" within NGPA, §2(21), 15 U.S.C. §3301(21). Michigan submits the decision of the Fifth Circuit is erroneous, because it (1) judicially puts an end to price regulation, at both the federal and state levels, of natural gas production by interstate pipelines, intrastate pipelines, and local distribution companies without those matters having been addressed by Congress, (2) judicially creates a fictional transaction which has no basis in fact, and directly contradicts a specific statutory provision, and (3) is based upon the incorrect assumption that no valid reason exists to distinguish between independent producers and pipelines.

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[4] See, 28 U.S.C. §2101(c).

I.

Effect of the Fifth Circuit's Decision

The Fifth Circuit's opinion states:

> ". . . [W]e hold that Congress *clearly* intended for any production attributable to an 'interstate pipeline, intrastate pipeline or local distribution company, or any affiliate thereof', to be accorded first sale status under the NGPA and that Congress contemplated that the intracorporate transfer of pipeline production to the pipeline would be treated as a first sale." 664 F.2d 530, 538. (Emphasis supplied)

The decision thus qualifies all pipeline production for NGPA ceiling prices, whether produced by interstate pipelines, intrastate pipelines or local distribution companies previously regulated by the various states. This broad holding was made without any suggestion in the lengthy legislative history of the NGPA that Congress intended to end state regulation, or that such state regulation was a significant element of the dual market problem created under the NGA when producers sold their gas in the unregulated intrastate markets rather than in the regulated interstate market. The NGPA imposed regulation for the first time upon sales by producers to intrastate customers, but there is nothing in it to indicate an intention to preempt existing state regulation over the cost of gas produced by intrastate pipelines and local distribution companies. In fact Section 602(a), 15 U.S.C. §3432(a), expressly reserves state authority to prescribe maximum rates lower than those authorized by "first sales".

Thus, the impact of the Fifth Circuit's decision on state regulation will be enormous. Additionally, the financial impact of the decision in the interstate market will be significant

and burdensome to gas consumers. The petition for certiorari of the NYPSC contains a calculation that the nationwide increase in cost from repricing pipeline produced gas to NGPA maximum lawful prices will exceed $600,000,000. As the NYPSC notes, this impact is multiplied if the decision below is applied retroactively to the December, 1978 effective date of the NGPA.

A filing by El Paso Natural Gas Company now before the FERC in Docket No. TA 82-2-33 seeks approximately $110 million based on the lower court decision in this case for that company alone, on a retroactive basis, and $42 million annually on a prospective basis. Comparable figures for Colorado Interstate Gas Company in Docket No. 82-54 are approximately $105 million and $23 million, respectively. It is apparent therefore that the issue in this case is extremely important to pipelines, gas consumers and state and federal regulators alike, beccause of the huge financial impact and because the Fifth Circuit's decision ended over 40 years of federal regulation of interstate pipeline production and even more years of state regulation of production by intrastate pipelines and local distribution companies, all without any clear or express direction from Congress. Additionally, the issue is important to Michigan because natural gas production in the state by local distribution companies is presently priced by the Michigan Public Service Commission on a cost-of-service basis.

II.

The Fifth Circuit's Decision Conflicts with a Decision of the West Virginia Supreme Court, also on Petition for Writ of Certiorari

On December 10, 1981, the Supreme Court of Appeals of West Virginia refused leave to appeal a decision of the West Virginia Public Service Commission denying Pennzoil

Company NGPA prices for its production. Upon Pennzoil's request for rehearing prompted by the Fifth Circuit's decision in this case, the Supreme Court of Appeals again denied the petition to appeal on January 19, 1982. A Petition For A Writ of Certiorari from this court to the Supreme Court of Appeals of West Virginia was filed by Pennzoil on or about March 10, 1982 in Case No. 81-1672. That petition states:

> "The [West Virginia] Public Service Commission's order, affirmed by the Supreme Court of Appeals, is in direct conflict with the interpretation of the NGPA definition of 'first sale' adopted by the Fifth Circuit in *Mid-Louisiana*." Pennzoil's Petition, Case No. 81-1672, pp. 14-15.

Michigan submits that the conflict between the West Virginia Supreme Court of Appeals and the United States Court of Appeals for the Fifth Circuit regarding this important question is alone sufficient reason for this Court to issue a writ of certiorari to the court below.

III.

Intracorporate Transfers Do Not Meet the Section 2(21) Definition of "First Sale", Because They Are Not Transfers for Value Within The Section 2(20) Definition of "Sale"

The lower court's opinion assumes that every interstate pipeline has a distinct "production division" and "transportation division". While it is certainly useful to an understanding of the court's opinion to use this terminology herein, there is no real indication that all pipelines have such distinct divisions. What actually happens is that the pipelines have both produced gas and purchased gas for sale to their customers. Gas from these sources is commingled before sale in most cases. In Order No. 58 the FERC said sales from this commingled

stream were not "first sales" under the NGPA. Nevertheless, the Fifth Circuit labeled the commingling of sources as a transfer, called it a "first sale", and vacated Order No. 58. Thus, not only is the transfer itself a judicially created fictional transaction, but the arbitrary division by the lower court of a single entity into two distinct parts is also artificial.

The issue focused upon by the FERC in Order No. 58 and by the parties in the court below was whether sales to distribution companies and end users "downline" from the wellhead were "first sales" under Section 2(21) of the NGPA. However, the lower court reached its decision by focusing upon the fictional intracorporate transfer (commingling) as a first sale, imputing a sale at the wellhead from the pipeline to itself. The court thus eliminated the necessity to consider problematical policy and regulatory issues in the analysis of downline sales. It also made inapplicable an impressive array of legislative history assembled by the FERC, suggesting Congress intended NGPA prices to apply only to wellhead sales rather than downline sales.[5]

The holding of the lower court that Section 2(21) "clearly" accorded first sale status to pipeline production is just as *clearly* erroneous. The NGPA contains a simple and straightforward definition of "sale" in Section 2(20), 15 U.S.C. §3301(20), requiring a sale to be at the very least a "transfer for value." For an NGPA sale to exist there must therefore be a transfer of natural gas in exchange for something else of value. A "transfer" is a passing of property from one person to another. Black's Law Dictionary (5th ed.) p. 1342. A "transfer for value" constitutes a sale only when title to property passes from one to another for valuable consideration. "Where a transfer of property takes place without the trans-

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[5]

No. 80-3804, FERC brief, pp. 16-27, attached hereto as an appendix, pp. 1a-12a.

feror's receiving anything of value for the property transferred, the transaction is not a sale or exchange." *Helvering* v. *Nebraska Bridge Supply and Lumber Co.*, 115 F.2d 288, 290 (8th Cir., 1940). See, *Commission of Internal Revenue* v. *Feihofer*, 102 F.2d 787, 789 (3rd Cir., 1939).

The necessity for consideration in the transfer, or exchange for value, is not only implicit in Congressional use of the word "transfer", it is made mandatory by employing the term "for value." Value is any consideration sufficient to support a simple contract. *Standard Bank of Canada* v. *Lowman*, 1 F.2d 935 (W.D. Wa., 1924). Value also means valuable consideration. *Morehead* v. *Harris*, 262 N.C. 330, 137 S.E.2d 174 (1964). "The term [value] is often used as an abbreviation for 'valuable consideration', especially in the phrases 'purchase for value', 'holder for value', etc." Black's Law Dictionary (5th ed) p. 1391. The term "transfer for value" is a like phrase and should be construed the same; as requiring consideration.

Furthermore, a "transfer" cannot exist when a single entity transacts with itself. For example, it has been held that a change in ownership of property held as joint tenants by two individuals, to ownership by a corporation in which the same individuals were sole principals, is not a transfer. *North Shore University Hospital* v. *D'Elia*, 79 A.D.2d 606, 433 N.Y.S. 2d 495 (1980). Similarly, inter-corporate transactions between parent and subsidiary corporations are not sales, when no invoices are prepared, no payments made, and no delivery; only internal accounting entries. *Coulter Electronics* v *Department of Revenue*, 365 So.2d 806 (Fla. App., 1978). Also, the judicially created "first sale" doctrine in copyright cases requires a divestiture of the copyright to someone else, and only then is the right to vend that copyright lost. *United States* v. *Atherton*, 561 F.2d 747 (9th Cir., 1977). The same rationales hold true in this case. It is logical to require an actual transfer

to someone else before you call the transaction a first sale. There can be no first sale to yourself, and accounting entries are themselves insufficient to constitute a transfer.

Intracorporate transfers of pipeline natural gas production to the pipeline, if they actually exist, are not attendant with any of the indicia commonly associated with a natural gas sale, or transfer for value. No contract is signed, no invoices prepared, no payments made, no certificate of public convenience and necessity issued, no formal structure to the arrangement, no rights to be bargained, no give and take, no consideration, and nothing of value is transferred. The gas itself has value, but no valuable rights to that gas pass, and nothing is given to or by the pipeline in exchange. There is only a commingling of two different sources of gas. It cannot even be said that control over the gas passes, because the individual divisions, if they exist in a given pipeline, have no right to exercise independent control; they act only for the benefit of the pipeline as a whole. These transactions are not recorded as sales on the pipeline's books, and they do not result in collection of any revenue, taxable or otherwise. In short the transfer exists, if at all, only as accounting entries on the internal books and records of the pipeline as a single entity, and it should not be treated as anything more. The commission recognized the mere accounting nature of the internal transfer and in its brief to the lower court said: "It is simply not a sale at all."[6] The FERC's statement is true because an intracorporate transaction is neither a transfer from one to another, nor does it pass anything of value.

A "sale" was not defined by Congress in Section 2(20) to include intracorporate transfers or transfers without value, such as commingling two sources of gas. However, the lower court opinion glossed over this omission in the statute, pointed out

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[6]
No. 80-3804, FERC brief, p. 32.

to it by the FERC. This controlling issue was only mentioned on the very last page of the opinion, and the court then ignored it, without discussing the Section 2(20) definition of "sale". Had the court considered the Section 2(20) definition of "sale", it could only have concluded that intracorporate transfers (commingling) are not first sales, because they are not transfers for value.

While Michigan does not suggest the entire meaning of "first sale" is plain, the definition of the word "sale" is clear. When Congress defines a term in an unambiguous fashion, it is not generally subject to interpretation by the courts. *United States* v. *American Trucking Assoc.*, 310 U.S. 534 (1939).

The plain meaning of a term or provision in a statute is not controlling "when the plain meaning did not produce absurd results but merely an unreasonable one 'plainly at variance with the policy of the legislation as a whole' . . . ." 310 U.S. 534, 543, *supra*. On occassion, courts follow the purpose behind a statute rather than its literal words, when Congressional intent is ambiguous. But it is clear in this case that Congress did not expressly include pipeline production under the NGPA. Therefore, the unambiguous definition of "sale" is controlling, since it is not at variance with any explicit NGPA policy regarding pipeline production. Likewise, the stated NGPA policy respecting independent producers should not be applied by the court to pipelines.

To hold otherwise, as the court below did, creates a repeal by implication of pipeline regulation under the NGA; an action not favored by this court. *Posadas* v. *National City Bank*, 296 U.S. 497 (1936); *United States* v. *United Continental Tuna*, 425 U.S. 164 (1976). Furthermore, the lower court's holding violates the well settled regulatory principle that right to gain follows risk of loss. *Democratic Central Committee of District of Columbia* v. *Washington Metropolitan*

Area Transportation Commission, 485 F.2d 786 (D.C. Cir., 1973). Pipelines have not had to bear the risks of production and should not receive the gain associated within NGPA prices, especially when they earlier elected cost-of-service pricing because it was then beneficial. The FERC's interpretation of the statute preserves these considerations, while the lower court ignored them.

Moreover, Congressional intent to actually exclude pipeline production from the NGPA is shown by the House Report on the President's proposed National Energy Act embodied in H.R. 6831, which provided:

> "The Committee intends that the term 'first sale' be applied by the Federal Power Commission to the first transfer of natural gas for value *in an arms-length transaction*." H. Rep. 95-496, Part. 4, 95th Cong. 1st Sess. (1977), p. 103. (Emphasis Supplied)

There is no arms-length transaction involved in an intracorporate transfer of pipeline natural gas to the pipeline. The transaction is wholly within the parent pipeline, and cannot be accurately characterized as a "sale" by the pipeline to itself.

Additionally, in this case there exists more than 40 years of pipeline regulation underlying enactment of the NGPA. The lower court's interpretation of Section 2(21) brings that history to an end, without an express command from Congress. Such a long history of pipeline price regulation should not be lightly ended, by judicial creation of a fictional transaction. A long history of *lack* of regulation was the basis for this Court's declining to construe a statute to permit such regulation in *American Trucking Assoc., supra.* There is no good reason not to apply the same rationale to this case, finding

that a long history of regulation is an important determinant for continuing regulation of pipeline production, when Congress gives no express command to end it.

This Court has also said, "[i]t is commonplace that courts will further legislative goals by filling the interstitial silences within a statute or regulation." Where it appears Congressional silence is not "the result of lack of prescience", but rather is the result of "betoken permission or, perhaps considered abstention", courts are not "accredited to supercede Congress or the appropriate agency." In such a case "caution must temper judicial creativity in the face of legislative or regulatory silence." *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555, 565 (1980).

Congress has not been silent in defining the term "sale" under the NGPA, nor has the FERC. Furthermore, other sections of the NGPA support the FERC's conclusion that pipeline production was intended to be dealt with by rule. Section 203(b) provides:

> "For purposes of this section, in the case of any natural gas produced by any interstate pipeline . . . the first sale acquisition cost of such gas shall be determined in accordance with rules prescribed by the Commission." 15 U.S.C. §3343.

Section 501(a) provides similar guidance:

> "In general. — — Except where expressly provided otherwise, the Commission shall administer this Act . . . and . . . prescribe rules and orders as it may find necessary to carry out its functions under this Act." 15 U.S.C. §3411.

Section 501 delegates to the FERC exclusive authority to administer the NGPA and to define the terms used in that act.

The Conference Report to H.R. 5289 (which became the NGPA) states that Congress provided the FERC with "authority to refine definitions of terms provided in the Act in a manner that is consistent with the definitions provided."[7] On Section 501,[8] the Conference Report also provides:

> "The Commission may define terms . . . . For instance the Commission may define terms such as 'transfer for value' used in the definition of first sale; *it may also establish rules applicable to intracorporate transactions* under the first sale definition." H.R. Rep. No. 95-1752, 95th Cong., 2d Sess., p. 116, reprinted in 1978 U.S. Code Cong. & Ad. News 8800, 9033. (Emphasis Supplied)

The lower court erroneously concluded that use of the word "under" in the citation from the Conference Report immediately above "assumes that intracorporate transactions will fall within the first sale definition." 664 F.2d 530, 537.

Because the word "under" is used after the term "transfer for value", which is itself used only in the Section 2(20) definition of "sale", the Conference Report description of authority granted the FERC to define terms must logically and grammatically relate to a "transfer for value." Use of the term "first sale" at the end of the same sentence of the Conference Report merely recognizes that Section 2(20), defining "sale", is the premise for Section 2(21), defining "first sale". Therefore, no particular significance should be attached to the word "under" in the Conference Report, and it is reasonable to conclude that the FERC has authority to regulate intracorporate transactions, pursuant to its authority to define "transfer for

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[7]
H.R. Rep. No. 95-1752, 95th Cong., 2d Sess. p. 69, *reprinted* in 1978 U.S. Code Cong. & Admin. News 8983, 8985.

[8]
15 U.S.C. §3411.

value." Such an interpretation is logical because intracorporate transactions are clearly not arms-length and do not transfer anything of value. Hence, they were left to the FERC to define and regulate under the NGA, as the Conference Report expressly indicates. When an agency is expressly given such substantive authority, the agency's determination is given "legislative effect." *Schweiker* v. *Gray Panthers*, 453 U.S. ....; 69 L.Ed. 2d 460; 101 S.Ct. 2633 (1981); *Herweg* v. *Ray*, ... U. S. ....; 71 L.Ed.2d 137; 102 S.Ct. .... (1982).

When Congress delegates an agency power to prescribe standards it entrusts to the agency, "rather than to the courts, the primary responsibility for interpreting the statutory term." Upon review, a court "is not free to set aside those regulations simply because it would have interpreted the statute in a different manner." *Batterton* v. *Francis*, 432 U.S. 416, 425 (1977). Similarly, "'reliance on legislative history is . . . a step to be taken cautiously,'" because courts "'must be wary against interpolating [their] notions of policy in the interstices of legislative provisions.'" *Piper* v. *Chris-Craft Industries, Inc.*, 430 U.S. 1, 26 (1977). In *Piper*, this Court refused to find a fictional, implied cause of action, because the legislative history was sparse and inconclusive on the provision in question, just as it is here on the definition of "first sale" in Section 2(21). The Fifth Circuit should not have created a judicial fiction in this case either, for the same reasons.

It is unnecessary to treat intracorporate transfers (commingling) like first sales, as the lower court held it must to give meaning to the final clause of Section 2(21). That clause specifies pipeline sales of their own production will *not* be treated as first sales "unless such sale is attributable to volumes of natural gas produced by such interstate pipeline." The FERC interpreted this clause to apply only to sales at the wellhead. This interpretation did not make the "unless" clause meaningless as the Fifth Circuit opinion stated. In fact, many

such wellhead sales are made to other pipelines and end users, even though most pipeline production becomes a part of the pipeline's overall gas supply for subsequent resale. However, the court's construction of the "unless" clause of Section 2(21)(B) has the rather bizarre effect of pipeline production receiving maximum ceiling prices, while independent producers' rates for similar sales are limited to the price terms of the specific contract governing the sale, by Section 101(b)(9) of the NGPA, 15 U.S.C. §3311(b)(9).

When over 40 years of pipeline regulation under the NGA is considered in conjunction with the definition of "sale" in Section 2(20), the legislative history related to that section, other provisions of the NGPA, and the rules of statutory construction cited herein, it becomes readily apparent that the court below should not have resorted in this case to the judicial fiction of imputing a sale at the wellhead from an intracorporate transaction. On the contrary, there is good reason to conclude, from the long history of differing regulatory treatment of pipelines and independent producers which relieved pipelines of the risks of production, that Congress intended to exclude pipeline production from the NGPA and leave it to FERC regulation under the NGA.

CONCLUSION

This case raises important legal issues and policy considerations of first impression which deserve review by this Court. Additionally, the decision of the court below has a significant economic impact on gas consumers and an enormous effect on state regulation of natural gas production as it existed before the decision. When these issues are considered, along with the fact that the court below judicially created a fictional transaction completely eliminating the long history of regulation of pipeline production at the federal level, without

any clear indication of Congressional intent to do so, Michigan believes it is apparent this Court's review is warranted. Michigan therefore urges this Court to grant the writ of certiorari requested.

Respectfully submitted,

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April 30, 1982

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ARGUMENT

I. THE COMMISSION PROPERLY CONSTRUED THE NGPA IN CONCLUDING THAT A "FIRST SALE", FOR PRICING PURPOSES, MEANT WELLHEAD OR FIELD SALES, AND NOT A PIPELINE'S ORDINARY SALES OF ITS GENERAL GAS SUPPLY.

The NGPA's schedule of "wellhead" prices applies to "first sales" of natural gas. Here, the Commission concluded that these concepts did not stretch miles from the gas fields to cover a pipeline's sales of volumes of gas purchased from producers mixed with volumes which it produced. This construction is entitled to great weight on review, for it involves the contemporaneous construction of a new statute by the agency responsible for administering it. *United States* v. *American Trucking Assns.*, 310 U.S. 534, 549 (1940), *Norwegian Nitrogen Co.* v. *United States*, 288 U.S. 294, 315 (1933). As the Supreme Court recently said: "[t]he Act is best construed by those who gave it substance in promulgating regulations thereunder" (footnote omitted). *Ford Motor Credit Co.* v. *Milhollin*, 444 U.S. 555 (1980). This Court has applied that principle to the Commission's construction of the NGPA, explaining "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong." *Ecee, Inc.* v. *FERC*, 611 F.2d 559, 563 (5th Cir. 1980) *quoting Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381 (1969).

The Commission properly concluded that a pipeline's sale of the mixture of gas it produced and gas brought from other producers was not a "first sale" for NGPA purposes. This approach is a reasonable one, supported by the language and structure of the Act, by legislative history, and policy considerations.